INTERNATIONAL LIABILITY FOR MOB INJURIES.

IT is the undeniable right of every sovereign State, and to a reasonable extent the duty as well, to protect the persons and the property of its citizens visiting or domiciled in a foreign country, and when they are injured in a manner not warranted by the principles of international law, to intervene in their behalf. If the foreign country permits aliens thus to visit or reside in its territory, it impliedly guarantees them the same measure of safety and protection as is provided for its own citizens. Should it fail in this international duty in any respect, the government of the injured alien has a just cause for intervention and complaint. The principle was stated concretely by Chief Justice Marshall to be that

"The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing this condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have the right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition." [1]

This language was adopted as correct by Mr. Webster, then Secretary of State, in his report to the President on Thrasher's case,[2] and has been since generally approved as embodying an accepted principle of international law and a rule for the guidance of the government of the United States.

[1] Murray *v.* Schooner "Charming Betsy," 2 Cranch, 120.
[2] 6 Webster's Works, p. 523.

It being conceded, then, that an alien may, under certain circumstances, claim the protection and intervention of his own government, the more difficult question remains as to what offences against the alien will warrant such intervention and a demand for redress. An offence against an alien may be against a domiciled alien, or a visiting alien, or against an alien diplomatic or consular agent. The offence may be committed by private citizens or by the public authorities, or even by other resident aliens. It is necessary, therefore, in determining the extent of responsibility which the alien's government may justly throw upon the government where the offence is committed, to distinguish somewhat clearly each of these cases.

In the case of a domiciled alien the duty, and even the right, of his native government to interfere in his behalf may be greatly diminished or even lost by his own act in deliberately submitting his person and property to the jurisdiction of the country of his domicile. Any other rule would lead to endless international disputes of the gravest character, and give to the alien a double status—that of a citizen of his own country for the purposes of protection, yet without corresponding duties and obligations, and that of a permanent resident of his adopted country, deriving from it support and protection, yet with a reserved right of appeal to another sovereign power. Mr. Marcy, when Secretary of State, stated the rule to be observed in such cases with great clearness and force:

"It is essential, he said, to the independence of nations, and to the public peace, that there should be some limit to the right and duty of a government to interfere in behalf of persons born or naturalized within its jurisdiction who, on proceeding to a foreign country, and being domiciled there, may receive injuries from the authorities thereof. By the general law, as well as by the decisions of the most enlightened judges, both in England and in this country, a neutral engaged in business in an enemy's country during war, is regarded as a citizen or subject of that country, and his property, captured on the high seas, is liable to condemnation as lawful prize. No sufficient

reason is perceived why the same rule should not hold good in time of peace also, as to the protection due to the property and persons of citizens or subjects of a country domiciled abroad." [1]

Sir Robert Phillimore states the rule as follows:

"The distinction between domiciled persons and visitors in or passengers through a foreign country is never to be lost sight of, because it must affect the application of the rule of law which empowers a nation to enforce the claims of its subjects in a foreign State. The foreign domicile does not indeed take away this power, but it renders the invocation of it less reasonable, and the execution of it more difficult." [2]

In accordance with this rule, our government has frequently declined to interfere for the protection of citizens who, by acts indicating an intention to subject themselves permanently to a foreign jurisdiction, have thereby lost the right to claim the protection of the home government. Thus it has been held that failure to pay the income tax, enlistment in a foreign army, permanent residence abroad, and avoidance of the ordinary duties of citizenship, may be sufficient to release a government from its duty of protection. In the once famous cases of Arbuthnot and Ambrister, executed by General Jackson in 1818 for complicity in the Seminole War, the government of Great Britain, to which they owed allegiance, declined to interfere on the ground that by inciting an attack on a friendly government they had forfeited the protection of their own government.

If, however, the alien be only transiently visiting or passing through a foreign country, his status is wholly different. In such a case he loses none of his claims on his own government, for the reason that he evades none of his duties to it. He is merely the guest of the foreign country, owing it the duty of obedience to its laws and entitled from it to protection in person and property.

[1] Letter to Mr. Clay (Peru), May 24, 1855, 2 Whart. Dig Int. L.., 447, 448.
[2] 2 Phill. Int. L., 6.

Any offence against him must be treated as an offence to a friendly alien, for which reparation, in proper cases, may be demanded by his government.

This distinction between domiciled and visiting aliens may be rendered unavailing by reason of treaty stipulations fixing the status and rights of all aliens domiciled or visiting in a country who are subjects of the other treaty-making power. In such cases the obligations of the country in which the alien may reside or be temporarily visiting are fixed by the terms of the treaty, and not by the principles of international law. It is now common in treaties of amity and commerce to make such stipulations, and an injured alien may now generally claim redress under the terms of such a treaty.

In case the alien had a representative character, either diplomatic or consular, an injury to him is regarded as in effect an injury to his government. It is true that consular agents are not entitled to the same privileges and immunities as diplomatic agents, but they are, nevertheless, representatives for special purposes of their own governments, and any unlawful violence offered to them is an insult to the sovereignty which they represent.

As to the agents of the injury the distinction may be even broader. There is not believed to be any distinction, however, between injuries committed by citizens and by resident or visiting aliens. In either case the rights of the injured alien have been invaded while submitting himself to the protection of a foreign State, and that State owes him equal protection against the wrongful acts of its own citizens and those of other aliens whom it may have received within its territory. Such protection consists, at least in civilized States, in opening to him impartially the door to redress, usually by means of its courts, and in some cases by executive action. But if the offence be committed by the public authorities of the country the case is far different. Under such circumstances the government of the alien may insist immediately upon reparation if the

injury is the result of positive violence or maltreatment. Such act of the authorities may, moreover, be either positive or negative. They may use unlawful violence; they may connive at unlawful violence; or they may wilfully neglect to provide protection against unlawful violence. In any case, the government for which the authorities act becomes liable for the wrong-doing of its agents.

The application of these principles to cases of injuries to aliens arising out of the violence of a mob is not difficult.

It would seem reasonable that no greater international responsibility should rest upon a government for the unlawful action of a mob than for the unlawful action of a private individual. And in general this proposition is true. It is only when the government either, having knowledge of the intention of a mob, fails to use due diligence to prevent it from assembling and executing its design, or else, having knowledge of its actual and continuing violence, fails to use due diligence to suppress it, that any responsibility can attach to the government, as such, for the injuries suffered by the aliens. This is believed to be a fair statement of the rule of international law as it is applied in practice by the powers of the civilized world.

In addition to this rule, however, and in many cases a corollary of it, is the further rule that the government is under an international obligation, first, to use all proper means for the punishment of the offenders, and second, to provide a legal remedy to the sufferers or their representatives. Upon the first point, our government has again and again enunciated the principle that a wilful neglect to bring the transgressors to justice is an implied sanction of their acts. This was so declared by Secretary of State Marcy in 1854, with regard to the outrages committed by the lawless inhabitants of Greytown upon the persons and property of American citizens engaged in inter-oceanic

transit across Nicaragua. It was so admitted to be the law of international obligations by Secretary of State Fish in 1875, in reply to the claims of Mexico based on the murder of Mexican citizens by Texan border raiders. Upon the second point there is a like uniformity of utterance by the State Department of the government of the United States. As early as 1793 Jefferson, as Secretary of State, declared the test as to the right of intervention to be,

"Whether the party complaining has duly pursued the ordinary remedies provided by the laws, as was incumbent on him before he would be entitled to appeal to the nation, and if he has, whether that degree of gross and palpable negligence has been done him by the national tribunals which would render the nation itself responsible for their conduct."[1]

The universal rule in such cases is that the injured party is bound to exhaust the judicial remedies afforded him by the municipal laws of the place of the injury before he can appeal to the executive department of the government for redress. This principle carries with it the corollary that a State is bound to supply a judicial remedy or to be held at once responsible through its executive department. It is therefore the practice to submit claims for indemnity in such States as China directly to the executive department, while in European States they must first be adjudicated by the courts. There must be a remedy somewhere, and if the State provides no judicial remedy, another State whose citizens have been injured may demand redress of the government through diplomatic channels. The law on these two points was well stated by Mr. Fish in these words:

"The rule of the law of nations is that the government which refuses to repair the damages committed by its citizens or subjects, to punish the guilty parties or to give them up for that purpose, may be regarded as virtually a sharer in the injury, and as responsible therefor."[2]

[1] Letter to the Attorney-General, Mar. 13, 1793; 2 Whart. Dig. Int. L., 675.
[2] For. Rel. of U. S., 1873, title Mexico; 2 Calvo, Int. L., 397.

Several instances have occurred in the course of American diplomacy when it became necessary to apply these principles in disposing of the claims of other governments based on injuries to aliens.

In 1850 mobs in New Orleans and Key West, influenced by the severe punishment inflicted in Cuba upon the members of a filibustering expedition from the United States, sacked the houses and shops of many resident Spaniards and in New Orleans attacked the Spanish consulate itself. In this outbreak of mob violence there were two distinct injuries, the first and most serious in the view of international law being to the dignity and honor of Spain as represented in the person of her consul and the inviolability of the consular office, and the second being to the persons and property of the resident subjects of Spain. In accordance with the principles above set forth, Mr. Webster, then Secretary of State, drew a sharp distinction between the liability of the government of the United States for these two classes of injuries. As to the first, he apparently entertained no doubt that the government owed the amplest apologies for the affront to the sovereignty of Spain and the completest indemnity which could in justice be asked. In accordance with this view President Fillmore, in his annual message in 1851, recommended that Congress should appropriate the necessary money to carry out this purpose, and in this recommendation Congress concurred. This indemnity was granted as a matter of right.

As to the private Spanish residents who were injured by the mob, Mr. Webster emphatically denied that they had any just claims against the government for indemnity. They had come, he said, voluntarily into the jurisdiction of the United States to pursue their private business and objects, and while within that jurisdiction were entitled to the same measure of protection, and no more, as was accorded to our own citizens. In fact, as he pointed out, their protection in the way of remedies was even ampler than that accorded to the American citizens who had

suffered like injuries at the hands of the mob, for while the injured aliens could pursue their remedies in the Federal courts or the State courts at their election, the citizens could pursue theirs only in the State courts. This double judicial remedy being therefore opened to the injured Spaniards, the government of the United States declined to regard the claims for indemnity as resting on any accepted principle of international law or any obligation of treaty stipulations. Nevertheless, our government expressed the greatest sympathy for the injured subjects of Spain, and as a mark of appreciation of the generosity of the Spanish sovereign in pardoning certain American citizens who had been condemned to death under the Spanish laws, Congress appropriated, in 1853, the sum necessary to indemnify the Spanish victims of these riots. The money was paid, however, upon the understanding that it should be deemed a gratuity and not a lawful indemnity. The principle was saved, and the reparation was granted as a matter of grace.[1]

In subsequent diplomatic discussions arising out of mob injuries the precedent of this case has been frequently cited both for and against the United States. It has always been contended by our government, however, that there was in this case no recognition whatever of the principle of indemnity for mob injuries, but that, on the contrary, the principle was expressly denied, and that the government refused to consider itself in any way responsible for injuries committed by private individuals upon aliens residing within its jurisdiction. It is certain that the earlier correspondence of the State Department strongly presses this view of the case and that there was no failure politely to emphasize it at the time of the payment of the indemnity. Any fair interpretation of the correspondence and the circumstances must lead to the conclusion that

[1] House Ex. Docs., 2 and 113, 32d Cong., 1st. sess.: Resolution of Cong., March 3, 1853.

there was no recognition of any binding international obligation growing out of the mob violence other than that to the consular representative of Spain.

In 1880 a mob in Denver attacked the Chinese residents of that city, destroyed a large quantity of their property and killed one of their number. The Chinese government immediately demanded that protection be extended to Chinese subjects in Denver, that the guilty persons be punished, and that the owners of the property destroyed be compensated for their losses. The government of the United States, replying through Mr. Evarts, expressed its indignation at the wanton and lawless action of the mob, assured the Chinese government that as full protection would be accorded to the Chinese as to our own citizens, and explained that under our form of government the punishment of the offenders was solely within the jurisdiction of the State of Colorado, and that the Federal Government could not interfere in that regard. As to the suggestion that indemnity should be afforded the sufferers, Mr. Evarts replied in these words:

"Under circumstances of this nature, when the government has put forth every legitimate effort to suppress a mob that threatens or attacks the life, the safety, and security of its own citizens and the foreign residents within its borders, I know of no principle of national obligation, and there certainly is none arising from treaty stipulation, which renders it incumbent on the government of the United States to make indemnity to the Chinese residents of Denver who, in common with citizens of the United States at the time residents of that city, suffered losses from the operations of the mob. Whatever remedies may be afforded to the citizens of Colorado, or to the citizens of the United States from other States of the Union resident in Colorado, from losses resulting from that occurrence, are equally open to the Chinese residents of Denver who may have suffered from the lawlessness of the mob. This is all that the principles of international law and the usages of national comity demand."[1]

This reasoning seems not to have been satisfactory to the Chinese government, which continued to press the

[1] For. Rel., 1881, title China, p. 320.

claim for indemnity. Mr. Blaine, who had in the meantime succeeded Mr. Evarts as Secretary of State, continued the diplomatic discussion along the same line, and declined to recognize any liabilities as attaching to the government of the United States in consequence of the mob violence in Denver. This position was all the more tenable in view of the later developments, by which it appeared that the authorities had at the time promptly taken measures to suppress the mob, and had since arrested a number of the ringleaders and indicted two of them for the murder of the Chinese subject. In fact, the Chinese government failed to show any point in which the government of the United States had in any way disregarded the obligation of international comity or of treaty rights. No neglect was shown before or at the time of the violence, and there was apparent no subsequent indifference with regard to the punishment of the offenders. In addition to all this, the courts of the State of Colorado and of the United States were open to all Chinese subjects who had suffered losses through the violence of the mob. In view of all this, our government properly declined to entertain any claim for indemnity.

In 1885 the same question was again reopened with China under the most distressing circumstances. A mob at Rock Springs, Wyoming, made an unprovoked attack upon the Chinese residents of the place, murdered twenty-eight of their number, wounded fifteen, and destroyed a large amount of property. The local authorities took no adequate measures either to prevent the outrage or to punish the perpetrators, while the local courts were notoriously not an impartial forum in which the sufferers could seek redress. The whole proceeding by the authorities, in the way of investigation and punishment, was characterized by President Cleveland as "a ghastly mockery of justice."[1]

[1] Special Message, March 2, 1886.

It appeared, however, upon investigation, that the assailants as well as the victims were aliens, that the violence grew out of the refusal of the Chinese to join in a strike then pending in the mining regions, and that American citizens were not responsible for the outrage. But this, while it saved to some extent the national honor, did not in anywise limit the national obligations as fixed by treaty or by international law. If any liability attached to the government of the United States in consequence of the outrage, it was equally binding, notwithstanding the alienage of the perpetrators. This was practically conceded by Mr. Bayard in his correspondence with the Chinese minister and by the President in his message to Congress.

The Chinese government on this occasion pressed the claim for indemnity with more than ordinary vigor, as it was well able to do in view of its own recent course in providing redress for American citizens who had suffered from the riots in Canton and other places in 1883. The Chinese minister appealed to the practices of his own government in like cases, to the terms of treaty stipulations, and to the spirit of modern international relations. The position of our government was not an easy one. The outrage had been cruel in the extreme; the prompt action of China in redressing the wrongs of Americans under like circumstances called for recognition from a republic which prided itself on its civilization and love of justice; the dictates of humanity and the precepts of morality all leaned toward a policy of full and generous reparation. But seemingly opposed to all this was an alleged principle of international law which it was deemed impolitic and, looking to the future, highly embarrassing to ignore.

In this predicament the government steered a middle course, maintaining the supposed principle on the one side while recommending a voluntary indemnity on the other. Mr. Bayard, in his note to the Chinese minister, took the ground that as the offence was committed by private indi-

viduals against private individuals there could be no liability on the part of the government, and that for all injuries received the sufferers had an adequate remedy in the courts of Wyoming and the United States:

"The government of the United States recognizes in the fullest sense the honorable obligation of its treaty stipulations, the duties of international amity, and the potentiality of justice and equity, not trammelled by technical ruling nor limited by statute. But among such obligations are not the reparation of injuries or the satisfaction by indemnity of wrongs inflicted by individuals upon other individuals in violation of the law of the land.

"Such remedies must be pursued in the proper quarter and through the avenues of justice marked out for the reparation of such wrongs.

"The doctrine of the non-liability of the United States for the acts of individuals committed in violation of its laws is clear as to acts of its own citizens, and *a fortiori* in respect to aliens who abuse the privilege accorded them of residence in our midst by breaking the public peace and infringing upon the rights of others, and it has been correctly and authoritatively laid down by my predecessors in office, to whose declarations in that behalf your note refers. To that doctrine the course of this government furnishes no exception."

After proceeding to illustrate this principle by reference to the course of the government as to the Spanish riots in New Orleans in 1850, the Secretary proceeds:

"Yet I am frank to say that the circumstances of the case now under consideration contain features which I am disposed to believe may induce the President to recommend to Congress, not as under obligation of treaty or principle of international law, but solely from a sentiment of generosity and pity to an innocent and unfortunate body of men, subjects of a friendly power, who, being peaceably employed within our jurisdiction, were so shockingly outraged; that in view of the gross and shameful failure of the police authorities at Rock Springs, in Wyoming Territory, to keep the peace, or even to attempt to keep the peace, or to make proper efforts to uphold the law or punish the criminals, or make compensation for the loss of property pillaged or destroyed, it may reasonably be a subject for the benevolent consideration of Congress whether, with the distinct understanding that no precedent is thereby created, or liability for want of proper enforcement of police jurisdiction in the Territories, they will not, *ex gratia*, grant pecuniary relief to the sufferers in the case now

before us to the extent of the value of the property of which they were so outrageously deprived, to the grave discredit of republican institutions." [1]

In accordance with this correspondence, President Cleveland, in his special message of March 2, 1885, recommended an appropriation for this purpose, "with the distinct understanding that such action is in nowise to be held as a precedent, is wholly gratuitous, and is resorted to in the spirit of pure generosity toward those who are otherwise helpless." The appropriation was duly made and the claims were settled to the satisfaction of the Chinese government and the injured parties.

This case comes dangerously near the line at which governmental responsibility begins, as that line is fixed by international law and by the declarations of our own government. The confession by the government that no adequate protection was afforded, that "the proceedings for the ascertainment of the crime and fixing the responsibility therefor were a ghastly mockery of justice," and that there existed a "palpable and discreditable failure of the authorities of Wyoming Territory to bring to justice the guilty parties, or to assure to the sufferers an impartial forum in which to seek and obtain compensation for the losses which those subjects [of China] have incurred by a lack of police protection," [2] is a practical admission that the United States—for China deals only with the Federal government—had failed either to punish the guilty or to offer an adequate means of redress to the innocent. On both of these points our own government has on other occasions declared: (1) That neglect to prosecute offenders would be a denial of that justice which the alien's government has a right to expect; [3] and (2) that justice may as much be denied when it would be absurd or useless to

[1] For. Rel., 1886, title China, pp. 166, 168.

[2] President's Message, March 2, 1886.

[3] Sec. of State Fish, February 19, 1875; For. Rel., 1875, title Mexico.

seek it by judicial processes, as if it were denied after having been so sought.[1]

Confessedly the local government of Wyoming neglected to prosecute in good faith the offenders in the Rock Springs riots, and that it would have been useless for the Chinese sufferers to resort to the courts for justice is expressly declared by the President. Under such circumstances there would seem to have been a plain and palpable denial of justice, leaving to the sufferers as the only recourse an appeal to the Federal Executive through diplomatic channels. That this view largely influenced the State Department and the Executive in recommending an indemnity cannot be doubted. The reservation of the alleged principle may therefore justly be regarded as a piece of excessive diplomatic caution, intended mainly to protect the government from the full force of this case as a precedent. There can be no doubt that morally the United States were bound to repair, so far as possible, the injuries done to these inoffensive aliens; while there is little doubt that the accepted principles of international law laid upon the government an equally binding obligation.

It is to be observed, however, that this international liability was fixed, not by the fact of the mob injury itself, nor yet by the course of China toward the United States in like cases, but by the conduct of the public authorities subsequent to the outrage. Had the proceedings for the punishment of the offenders been honestly and vigorously conducted, and had the judicial remedy of the sufferers been adequate and impartial, no responsibility could have been fastened upon the Federal government. Under such circumstances, to quote Sir Robert Phillimore,

"The State must be satisfied that its citizen has exhausted the means of legal redress offered by the tribunals of the country in which he has been injured. If these tribunals are unable or unwilling to entertain and adjudicate upon his grievance, the ground for interference is fairly laid."[2]

[1] Sec. of State Fish., Dec. 16, 1873: For. Rel., 1873. [2] 2 Int. L., 4.

But in this case there was, confessedly, no means of legal redress to exhaust, for the tribunals had plainly exhibited an unwillingness to entertain or adjudicate in an impartial manner the claims of the injured subjects of China. This being so, the ground for interference was fairly laid, and China was fully justified in demanding reparation at the hands of the government of the United States. However this fact may have been obscured by the cloud of diplomatic verbiage and the reservation of alleged principles, it remains as the decisive test of liability in this and similar cases.

Pending the judicial investigation and diplomatic discussion of the mob violence in New Orleans on March 14th of the present year, by which a number of Italian subjects were unlawfully put to death, it may not be proper to do more than make a general application of the above principles to this particular occurrence. It is well to point out, however, that in some features this case is sharply distinguished from those already referred to. In the first place, the victims were in the custody of the public authorities, and therefore, being deprived of the ordinary means of retreat or self-defence, entitled to the fullest protection. In the second place, it would seem—although this may be a disputed question of fact—that the proposed attempt of the mob was known some hours in advance of the assault, and that those responsible for the safety of the prisoners took no adequate measures for their protection. If these two premises are fully established, it is difficult to see how, under the principles of international law as recognized and applied by our own government, the United States can escape from the claim of Italy for reparation; if, added to these, there should prove to be a failure of justice in the punishment of the offenders, the case would become a very strong one. The fact is, there would seem to be no practical difference in effect between an act of positive maltreatment of an alien prisoner by public officers and an act of culpable negligence on the part of such officers whereby such alien

prisoners are suffered to receive positive maltreatment at the hands of others. In the first case our government has emphatically asserted the right to redress from the executive department of the government, and in this it is supported by high authority. It is difficult to see why redress may not as justly be claimed in the case of wilful negligence resulting in injury.

In the case of a riot in Brazil in 1875, by which the property of certain American citizens was destroyed, Mr. Fish, then Secretary of State, declared that

"It is the duty of Brazil, when she receives the citizens of a friendly State, to protect the property which they carry with them or may acquire there. If persons in the service of that government connive at or instigate a riot for the purpose of depriving a citizen of the United States of his property, the Imperial government must be held accountable therefor." [1]

And in a similar case occurring in Peru, Mr. Evarts declared that

"A government is liable internationally for damages done to alien residents by a mob which by due diligence it could have repressed." [2]

These propositions involve in all cases questions of fact, and the facts must be accurately ascertained before the principles can be applied. It would therefore be premature to venture a final opinion upon the unfortunate affair at New Orleans; but should the pending investigation establish the fact that the public authorities, having knowledge of the proposed violence, failed to exercise due diligence to prevent it, the declarations and practices of our own government, as well as the just principles of international law, would serve to fix upon the Federal government a direct liability for the injuries sustained by the subjects of Italy.

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[1] 2 Whart. Dig. Int. L., 602.

[2] Ibid.